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FILE COPY

No. 484

In the Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

THE COOPER CORPORATION ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on August 31, 1940.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 102) is reported in 31 F. Supp. 848. The opinion of the Circuit Court of Appeals (R. 115–118) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 31, 1940 (R. 119). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States has the right to maintain an action under Section 7 of the Sherman Act to recover triple damages for injuries inflicted upon it by an illegal combination and conspiracy.

STATUTE INVOLVED

The pertinent provisions of the Sherman Act (c. 647, 26 Stat. 209, 15 U. S. C., Sec. 7, 28 U. S. C., Sec. 430a) follow:

> SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.
>
> SEC. 8. The word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

STATEMENT

This is a suit brought by the United States under Section 7 of the Sherman Act against eighteen companies, engaged in the manufacture and sale of rubber tires, to recover triple damages for injuries alleged to have been inflicted upon the United States by an illegal combination and conspiracy to fix collusive prices. The bill of complaint was filed in the United States District Court for the Southern District of New York on February 20, 1939 (R. 1, 3–18).

The pertinent allegations of the bill of complaint may be summarized as follows:

The suit is brought by the United States in its capacity as a purchaser of commodities for consumption by the executive departments of the government (R. 3). Prior to August 17, 1936, the defendants entered into a combination and conspiracy to fix collusive prices for tires to be sold to the United States (R. 4–5). Pursuant to this combination and conspiracy, the defendants submitted to the Procurement Division of the Treasury Department sealed bids on the tire requirements of the United States for the period October 1, 1936, to March 31, 1937. These bids were identical to the penny on eighty-two different sizes of tires (R. 5–6). The United States purchased tires throughout the period October 1, 1936, to March 31, 1937, at prices fixed by the de-

fendants. These prices were higher than they would have been had the illegal conspiracy not existed (R. 6–8).

Acting pursuant to the conspiracy, the defendants thereafter again submitted sealed bids to the Treasury Department for the tire requirements of the United States for the next purchasing period, from April 1, 1937, to September 30, 1937. These bids were likewise identical to the penny on eighty-two different sizes of tires (R. 8–9). The United States purchased tires from the defendants at these collusive prices through the period from April 1, 1937, to September 30, 1937. These prices were substantially higher than the prices fixed by the conspiracy for the preceding period, October 1, 1936, to March 31, 1937, and were higher than they would have been if the conspiracy had not existed (R. 8–11).

Identical bids were again submitted by the defendants on the tire requirements of the United States for the period October 1, 1937, to March 31, 1938. The prices contained in the identical bids were substantially higher than the prices fixed by the combination and conspiracy for the preceding purchasing period and were likewise higher than they would have been in the absence of the combination and conspiracy (R. 11–12).

Confronted with continued identical bidding and progressive price increases, the Treasury Department sought the counsel of the Attorney General of the United States. The Attorney General ad-

vised the Treasury Department that the bids for the period October 1, 1937, to March 31, 1938, should be rejected on the ground that the bids were *prima facie* the result of a combination in restraint of trade (R. 12). The Procurement Division thereupon rejected the bids, advised the defendants of the grounds for the rejection, and invited the submission of new bids for the same period. The defendants, still acting pursuant to the illegal combination and conspiracy, again submitted sealed bids which were identical to the penny on eighty-two different sizes of automobile tires and which were also identical with the bids which previously had been rejected. The Treasury Department rejected these bids as collusive (R. 12–13).

Thereupon the Treasury Department determined that a public exigency existed and, pursuant to authority conferred by Section 3709 of the Revised Statutes (36 Stat. 861, 41 U. S. C., Sec. 5), negotiated a contract with Sears, Roebuck and Company for the government's tire requirements for the period October 1, 1937, to March 31, 1938 (R. 13–14).

When invited to bid on the government's tire requirements for the next purchasing period April 1, 1938, to September 30, 1938, the defendants submitted competitive bids. As a result, the United States was able to purchase tires for this period from the defendants at prices which were substantially lower than the prices at which it had purchased its tires for the two preceding periods—

October 1, 1936, to March 31, 1937, and April 1, 1937, to September 30, 1937—and which were also lower than the prices at which the government had purchased its tires from Sears, Roebuck and Company during the period October 1, 1937, to March 31, 1938 (R. 14–15).

Between October 1, 1936, and September 30, 1938, there was no decline in the retail prices of tires to the general public throughout the United States. Had it not been for the conspiracy the government would have been able to purchase tires for the three periods—October 1, 1936, to March 31, 1937; April 1, 1937, to September 30, 1937; and October 1, 1937, to March 31, 1938—at prices at least as low as the prices at which it purchased tires during the period April 1, 1938, to September 30, 1938 (R. 15).

The damages inflicted upon the United States amounted to $351,158.21 and the bill of complaint asks judgment for three times this amount, or $1,053,474,63 (R. 16–17).

The defendant F. G. Schenuit Rubber Company is no longer a party to the suit. On April 27, 1939, the District Court entered an order vacating and setting aside the service upon this defendant (R. 1).

All of the remaining defendants filed motions to dismiss on the ground that the bill of complaint failed to state a claim against the defendants (R. 101). The sole ground urged by defendants in support of their motion was that the United States

is not a "person" within the meaning of Section 7 of the Sherman Act. The District Court upheld the defendants' contention (R. 102–108) and dismissed the complaint (R. 109).

An appeal was taken to the United States Circuit Court of Appeals for the Second Circuit; on August 8, 1940, that court, with Judge Clark dissenting, handed down a decision affirming the judgment of the District Court (R. 119).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that the United States has no right to maintain an action under Section 7 of the Sherman Act, and

(2) In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. This case raises an issue of public importance which this Court has never decided. Because this is the first action of its kind ever brought by the United States, no other Circuit Court of Appeals has ever considered the issue of statutory construction which it raises. It is submitted that the public interest will be served by a determination by this Court as to whether the United States is a "person" within the meaning of Section 7 and entitled to maintain a suit for triple damages.

2. The question is one of practical importance. The federal government is the largest purchaser of goods in the United States. An authoritative study

shows that in a recent twelve-month period the dollar value of purchases by the United States amounted to more than $860,000,000.[1] It is reasonable to anticipate that these purchases will increase in amount because of the defense program in which the federal government is now engaged. The construction of Section 7 adopted by the court below leaves the United States powerless to recover damages for injuries inflicted upon it as a purchaser of goods by illegal combinations and conspiracies. The provisions of the antitrust laws providing for criminal proceedings and suits in equity afford no remedy for the United States in cases where circumstances have compelled it to purchase goods on the basis of collusive prices or where it is faced, as it was in this case, with persistent collusive bidding. When goods are required at once, the United States cannot postpone its purchases until the final disposition of a criminal proceeding or a suit in equity. Once goods have been purchased at inflated and non-competitive prices, neither an indictment

[1] This study is entitled *Study of Government Purchasing Activities*, Part I, *Magnitude and Characteristics of Government Purchasing*, Part II, *Survey of Practice of Identical Bidding for Government Purchase Contracts*. It was prepared by the Treasury Department and is embodied in a report filed with the Temporary National Economic Committee. The study covered the period from December 1937 to November 1938. The figure of $860,000,000 is found in a summary of the report contained in a press release of the Temporary National Economic Committee issued January 2, 1940 (T. N. E. C. Release No. 22, December 28, 1939).

nor an injunction will compensate the United States for the damages suffered.

3. The decision of the Circuit Court of Appeals gives a technical and highly artificial meaning to Section 7 of the Sherman Act. It rests, moreover, upon asserted rules of statutory construction which are in conflict with the decisions of this Court.

The majority of the Circuit Court of Appeals assumes that a remedial statute which refers only to "persons" and makes no express reference to the United States confers no remedy upon the United States (R. 116). No such general rule of statutory construction has ever been applied by this Court, which has consistently held that the word "person" in a statute may include the United States and other bodies politic. In each case the issue turns upon the context in which the word is used and the purpose of the particular statutory provision involved. *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 91–92; *Ohio* v. *Helvering,* 292 U. S. 360, 370–371; *Stanley* v. *Schwalby,* 147 U. S. 508, 517. Cf. *Davis* v. *Pringle,* 268 U. S. 315.

The Circuit Court of Appeals also ignored the familiar and historic canon of construction that the state takes the benefits of a remedial statute even though not expressly named. *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239; *Commonwealth* v. *The Boston & Maine Railroad,* 3 Cushing 25, 45 (1849); *Magdalen College Case,* 11 Coke Rep. 66 b, 68 b; Black, *Interpretation of Laws,* (1896),

p. 122; Chitty, *Prerogatives of the Crown*, p. 382; Bacon's Abridgement, *Prerogative*, E. 5, Vol. 8 (Bouvier's Ed., Philadelphia, 1852), p. 92.

The court below likewise erred in holding that Section 8 of the Sherman Act was intended to restrict the meaning of Section 7. The definition of "person" contained in Section 8 was intended to amplify whatever meaning might properly be given to the word if Section 7 had stood alone. Section 7 standing alone is broad enough to include the United States, and Section 8 cannot properly be construed as intended to limit that meaning. Certainly, if Congress had intended to exclude the United States from the scope of Section 7, it would have done so expressly and without ambiguity. The majority of the Circuit Court of Appeals did not attempt to support their construction of Sections 7 and 8 by reference to the legislative history of the Sherman Act. That history supplies no support to the contention that Congress deliberately deprived the United States of a remedy which is available to every other purchaser of goods.

Finally, if Section 7 is limited by the language of Section 8, then the United States falls within the scope of the latter section because it is a corporation existing under and authorized by the laws of the United States. *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 91–92; *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Ex parte Siebold*, 100 U. S. 371, 392; *McCulloch* v. *Maryland*, 4 Wheat.

316, 406; *Cotton* v. *United States,* 11 How. 229, 231; *Denver & R. G. R. Co.* v. *United States,* 241 Fed. 614 (C. C. A. 8th); *United States* v. *Hill,* 60 Fed. 1005 (C. C. A. 6th); *United States* v. *Maurice,* 26 Fed. Cas. 1211, 1216 (C. C. D. Va.); *Dixon* v. *United States,* 7 Fed. Cas. 761 (C. C. D. Va.).

CONCLUSION

It is respectfully submitted that, for the reasons stated, this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER, 1940.

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